

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 17 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0258-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
WESTLEY VANCE HASKINS,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2000001375

Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

David Goldberg

Ft. Collins, CO  
Attorney for Petitioner

B R A M M E R, Judge.

¶1 Petitioner Westley Haskins seeks review of the trial court's order summarily dismissing his untimely, successive notice of and petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Haskins has not met his burden of establishing such abuse here.

¶2 In 2001, Haskins was convicted after a jury trial of possession of chemicals and equipment for the manufacture of dangerous drugs, manufacture of dangerous drugs, misconduct involving weapons, possession of drug paraphernalia, theft, child abuse, and second-degree escape. The trial court sentenced him to a combination of consecutive and concurrent, aggravated prison terms totaling eighteen years. His conviction for possession of chemicals and equipment for the manufacture of dangerous drugs was vacated on appeal, but his convictions were otherwise affirmed. *State v. Haskins*, No. 1 CA-CR 01-0628 (memorandum decision filed Aug. 8, 2002). His sentences, however, were vacated and his case remanded for resentencing because “the trial court may have aggravated [Haskins’s] sentence under the incorrect belief that [he] had two historical prior[ convictions].” *Id.* ¶ 20. On remand, the trial court again imposed concurrent and consecutive aggravated sentences totaling eighteen years’ imprisonment. Haskins then sought post-conviction relief, raising claims unrelated to his sentencing. The trial court summarily dismissed that petition in 2003, and Haskins’s subsequent petition for review was denied. *State v. Haskins*, No. 1 CA-CR 03-0579 (order filed July 20, 2004).

¶3 In September 2011, Haskins filed a notice of post-conviction relief with an accompanying petition, claiming pursuant to Rule 32.1(f) that his failure to appeal his sentencing timely “was without fault on [his] part” because he had not “obtain[ed] counsel and the transcript from the resentencing hearing” until “several years later” and only then “realized . . . that he had the right to direct review of his resentencing and that his prior lawyer had failed on his request to secure such relief.” He further explained in his petition that he had “slowly obtained additional documents on his case including for

the first time a copy of the transcript from the resentencing hearing” while pursuing a petition for writ of habeas corpus in federal court, which ultimately was denied. He asserted that, “only upon full review of the record and that transcript” did he “realize[] that neither [of his previous attorneys] had filed a Notice of Appeal nor otherwise sought relief” after resentencing.

¶4 The trial court summarily dismissed Haskins’s notice and petition, observing that Haskins had failed to explain “precisely when he became aware of this claim and why he delayed for so many years from when he first became aware of the claim before seeking . . . relief.” Thus, the court concluded Haskins had not “diligently pursued his post-conviction relief rights” and had not “provided sufficient justification to permit the filing of a delayed notice of appeal.”

¶5 On review, Haskins argues he had made a colorable claim he was entitled to relief under Rule 32.1(f) and therefore was entitled to an evidentiary hearing. A claim is colorable only if, taking the defendant’s allegations as true, it might have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). Haskins asserts that, because he “was at all relevant times represented by . . . counsel and neither counsel timely filed a Notice of Appeal” and he asserted that he only recently had learned that “he had the right to appeal” after “finally obtain[ing] the record in his case,” the trial court improperly summarily dismissed his claim by resolving the “factual issue” whether his failure to appeal timely was without fault on his part.

¶6 A claim pursuant to Rule 32.1(f) that “[t]he defendant’s failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was

without fault on the defendant's part" may be raised in an untimely or successive notice of post-conviction relief. Ariz. R. Crim. P. 32.2(b). But the notice "must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner" and a trial court must summarily dismiss any notice that does not contain "meritorious reasons . . . indicating why the claim was not stated in the previous petition or in a timely manner." *Id.* We find no abuse of discretion in the trial court's conclusion that Haskins did not provide meritorious reasons explaining his eight-year delay in bringing his claim.<sup>1</sup>

¶7 First, Haskins's claim that he was unaware he had a right to appeal clearly is belied by the record. At his resentencing, Haskins was provided with and signed a notice of rights of review after conviction that clearly stated that he had the "right to appeal . . . from a sentence which is illegal or excessive." To make a colorable claim, Haskins must do more than simply contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant's claimed unawareness that sentence "must be served without possibility of early release" not colorable when "directly contradicted by the record").

¶8 Moreover, Haskins's notice of and petition for post-conviction relief contain no support for his claim he had learned "several years" after his resentencing that no notice of appeal had been filed. Although he asserted he learned of this fact during the

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<sup>1</sup>We find unavailing Haskins's reliance on *State v. Rasul*, 216 Ariz. 491, 167 P.3d 1286 (App. 2007). That case does not discuss a delayed appeal pursuant to Rule 32.1(f) or whether the defendant there met his burden under Rule 32.2(b) to show diligence in pursuit of his claims.

litigation of his habeas corpus proceeding in federal court, he provided no supporting evidence. And Haskins did not inform the trial court precisely when he became aware that no appeal notice had been filed. Nor did he identify what steps he had taken, if any, to obtain the record in his case in a timely manner, or explain why it was not apparent to him during his first Rule 32 proceeding that his counsel had not sought review of his new sentences, as Haskins claims to have demanded.<sup>2</sup>

¶ For the reasons stated, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

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<sup>2</sup>We observe Haskins's supporting affidavit is internally inconsistent, as he avows he requested sentencing counsel challenge his new sentences, but only learned there was a basis for that challenge years later.